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No. 86-519

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SCHIAVONE CONSTRUCTION COMPANY, RAYMOND J. DONOVAN, RONALD A. SCHIAVONE, RICHARD C. CALLAGHAN, JOSEPH A. DICAROLIS, MORRIS J. LEVIN, ALBERT J. MAGRINI, GENNARO LIGUORI, AND ROBERT GENUARIO,

Petitioners,

-against-

MARIO MEROLA, DISTRICT ATTORNEY OF BRONX COUNTY, NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit, Division For The Purpose Of Appointing Counsel, Ethics In Government Act Of 1978

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the instant petition for a writ of certiorari is precluded by this Court's denial of an earlier petition posing the same question?

2. Whether the U.S. Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsel, abused its discretion when, in accordance with Rule 6(e) of the Federal Rules of Criminal Procedure, it disclosed portions of grand jury testimony—the substance of which had been disclosed to the public—for use by the District Attorney for Bronx County, New York in order to permit the District Attorney to prosecute the murder that occurred in Bronx County during and partly as a result of the Special Prosecutor's investigation and to prosecute a previously unsolved murder and related fraud?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Mario Merola, District Attorney, Bronx County, New York, respectfully requests that this Court deny the instant petition for a writ of certiorari, seeking review of the order of the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing In-

dependent Counsel, Ethics in Government Act of 1978 (hereinafter referred to as "the Special Division"),[1] entered on July 30, 1986 as this petition raises the very same arguments, predicated on the same principal cases, addressed by the Special Division two years ago and found wanting by this Court more than a year ago when it refused to grant an almost identical petition for a writ of certiorari, initiated by petitioner Raymond Donovan, the former Secretary of Labor. *Raymond Donovan v. Mario Merola,* ___ U.S. ___ , 105 S. Ct. 2155 (1985). As petitioners have added nothing in this most recent petition to what petitioner Donovan earlier propounded, respondent District Attorney respectfully submits this redundant petition should similarly be denied as frivolous.

STATEMENT OF THE CASE

[Petitioners have not described the procedural history to date in sufficient detail, particularly that period encompassing the earlier unsuccessful applications (a) to the Special Division seeking to vacate the Division's disclosure orders, and (b) to this Court seeking a writ of certiorari; respondent has cured that oversight by the following statement of the case.][2]

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[1] Congress created this Special Division of the Court under the Ethics in Government Act of 1978, providing that the Judges would be appointed under circumstances that would assure the Division's independence and impartiality, delegating exclusive responsibility to this Division to control the disclosure of investigatory records, including grand jury materials, submitted to the Division of the court by a Special Prosecutor (or Independent Counsel).

[2] References herein to the Petitioners' Brief and to Petitioners' Appendix are cited as "Pet. Brief at ___" and "Pet. App. at ___" respectively.

On December 29, 1981, in accordance with the Ethics in Government Act of 1978, the Special Division appointed Leon Silverman as Special Prosecutor to investigate numerous allegations against petitioner Donovan, the former Labor Secretary, and authorized the Special Prosecutor to prosecute "any violations of federal criminal law disclosed by his investigation."

On January 20, 1982, on application of the Special Prosecutor, a grand jury was duly empanelled for this investigation. The Special Prosecutor thereafter conducted and coordinated an investigation both before and outside the presence of the grand jury.

From January 1982 to June 1982, the Special Prosecutor, his assistants, staff, and F.B.I. agents (here and abroad) interviewed more than 288 persons; Mr. Silverman characterized 34 of those interviews as "principal interviews." The Special Prosecutor also conducted "dozens of interviews of grand jury witnesses immediately preceding their [grand jury] testimony."

On June 25, 1982, by order of the Special Division, an edited 708-page version of the Special Prosecutor's Report of investigation was made public.[3]

The Special Prosecutor's Report was so structured that it permitted one to identify each and every material witness the Special Prosecutor interviewed, whether that witness appeared before the Grand Jury,

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[3] Among the duties and powers of the Special Division are the disclosure of records procured or generated under Chapter 39 of Title 28. Pursuant to Title 28, United States Code, Section 595(b)(3), the Special Division may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as the Division deems appropriate.

and, although the testimony itself was deleted, even the subject each witness discussed as each witness was listed beneath subject headings within the body of the Special Prosecutor's Report.

Accompanying the Special Prosecutor's Report was "an appendix and [88] exhibits" including FBI Reports of interviews, Labor Department reports of interviews, correspondence, affidavits, newspaper articles, accounting and handwriting analyses, and more.

The Special Prosecutor's Report with Appendix consisted of his findings as to the allegations he investigated including the the establishment of a fraudulent Minority Business Enterprise ("MBE"),[4] the subject of the criminal fraud trial against petitioners now underway in Bronx County, New York.

According to the Special Prosecutor's Report, in 1978 petitioner Magrini, the Vice-President of petitioner Schiavone Company, told Mr. William Masselli (a defendant in the fraud trial but not a petitioner herein) to form an MBE if he wanted a construction contract with the Schiavone Company and so he did with Joseph Galiber, a black New York State Senator (also a defendant in the Bronx prosecution but not a petitioner herein). Masselli enlisted Senator Galiber because he was a minority and because of his political connections and they called the company Jopel (after *Jo*seph Galiber and William *Pel*legrino Masselli).

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[4] In 1977, Congress provided that "no grant shall be made . . . for any local public works project unless the applicant gives satisfactory assurance to the Secretary [of Commerce] that at least 10 per centum of the amount of each grant shall be expended for minority business enterprise." Title 42 U.S.C. Sec. 6705(f).

Jopel, however, had no equipment. On the other hand, Louis Nargi, a Schiavone Company subcontractor, did have equipment. Mr. Masselli "persuaded" Nargi to become a "silent partner" in Jopel. As reported by the Special Prosecutor, Nargi alleged that Mr. Masselli formed Jopel as "a device to circumvent [the] law requiring [the] Schiavone [Company] to give a certain percentage [10%] of their subcontracts to minority companies [MBE's]." According to the Special Prosecutor, Mr. Masselli claimed he paid $20,000 cash as a kickback to petitioner DiCarolis of the Schiavone Company in return for a $200,000 interest-free loan from petitioners Donovan and DiCarolis in March 1979 thereby enabling Masselli's company, Jopel, to finance the payroll and to appear to operate as an MBE subcontractor on a federally funded public works project.

The Special Prosecutor's Report found that in order to build up the volume of Jopel's work, a joint venture (called the S-I-C joint venture) purchased approximately $1 million dollars worth of equipment which it rented to Jopel. But Jopel never made any payments on the equipment. Rather, Jopel billed petitioner Schiavone Company for the work, including the rental charge. Petitioner Schiavone Company deducted the equipment rental charges from amounts due Jopel and paid the remainder of the bill. The net effect was to increase the amount of work attributable to an MBE. (Subsequent investigation by the District Attorney also uncovered that Jopel did not utilize the equipment nor did Jopel even supervise its use.)

Not long after Nargi assigned his contract to Jopel, according to Nargi, he "lost control of his company" and "realized he could not win" and so he walked

away from the business because "Masselli knows all sorts of dangerous people" including a "made guy" and "made guys hurt people." Masselli, who assumed Nargi's contract with Schiavone Company approval, also assumed Nargi's equipment and his books. Nat Masselli, an accountant and William Masselli's son, "took control of the books."

During his investigation, the Special Prosecutor made consensual recordings. He had Nat Masselli -- Jopel's bookkeeper -- tape conversations with petitioner Levin to corroborate William Masselli's various claims including his assertion he paid a $20,000 kickback for the $200,000 loan. During those conversations, petitioner Levin and Nat Masselli discussed the kickback for the $200,000 loan and how Masselli's father would testify before the grand jury about this and other matters.[5]

The Special Prosecutor let it be known publicly, in his June report, that Nat Masselli made these consensual recordings.

In July 1982, in response to new allegations of impropriety by petitioner Donovan and new evidence regarding some of the allegations already investigated, Special Prosecutor Silverman reopened his investigation. In this second phase of the investigation, Mr. Silverman summoned William Masselli to testify before the grand jury on August 26, 1982.

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[5] William Masselli also claimed that Jopel was entitled to 7 1/2 % of $8 Million listed as "rental costs" of equipment from Schiavone Construction Company which in fact were never incurred but were attributed as payments by Schiavone Construction Company to Jopel.

On August 25, 1982, the day before William Masselli was to testify before the Special Prosecutor's grand jury, Nat Masselli was murdered in Bronx County, New York. Thus did respondent, the District Attorney for Bronx County, commence a criminal investigation into the murder of Nat Masselli.

Subsequent investigation by the District Attorney of Bronx County, New York and the New York City Police Department revealed that one of the reasons Nat Masselli was murdered related to his father's scheduled appearance before the grand jury, as well as the conversations Nat Masselli earlier recorded at the Special Prosecutor's behest.

In the course of the Masselli murder investigation, the District Attorney conferred with the Special Prosecutor and, as a result, requested certain evidentiary materials.

On November 12, 1982, the Special Division granted, with the Special Prosecutor's consent, the District Attorney's request for specific materials relating to the subject matter of the District Attorney's investigation including the conversations Nat Masselli taped on May 12, 14, 17 and 19, 1982, related grand jury testimony, and other exhibits for the purpose of "presentation before a grand jury and the enforcement of the criminal laws of New York State." The Special Division panel fully understood what it was doing when it ordered these materials disclosed to the District Attorney[6] and plainly contemplated that "enforcement of the criminal laws of New York

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[6] The Special Division noted it "had many years experience in the District of Columbia and in New York prosecuting federal criminal offenses." [Pet. App. at 7a, note 2.]

State" meant that the materials would be used not only before the grand jury but at trial if the investigation resulted in any indictments.[7]

During the separate trials of defendants Salvatore Odierno and Philip Buono, charged with the murder of Nat Masselli, the Special Prosecutor's Assistant and a Special Agent testified as to Nat Masselli's cooperation with the Special Prosecutor, why the conversations between Nat Masselli and petitioner Levin were taped unbeknownst to Levin, and what was said in those conversations.

The investigation into the Nat Masselli murder by the Bronx District Attorney's office uncovered evidence that related to the unsolved 1978 murder of Salvatore Frascone. Frascone was murdered as a result of a dispute between William Masselli and Louis Nargi concerning control of the Schiavone Construction Company subcontract, involving the ownership of the equipment, execution of the subcontract, and division of the profits; Frascone, Nargi's brother-in-law, attempted to intervene on Nargi's behalf and, as a result, Masselli and another man murdered Frascone on September 22, 1978.

The Special Prosecutor's Report of June 25, 1982, and his later report of September 10, 1982, described in great detail the relationship between and among

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[7] In its recent order, the Special Division stated, "It seems quite obvious that criminal laws of the State of New York are 'enforced' ultimately through criminal trials." The Special Division therefore characterized as *"bizarre"* -- underscoring in the original -- petitioner's argument that the Special Division, by "enforcement", only intended to authorize use of the materials for the grand jury and not for trial. [Pet. App. at 7a, note 2.]

petitioners, the Schiavone Company, Jopel and Nargi. The District Attorney, again with the consent of the Special Prosecutor, therefore specifically requested disclosure of particularly defined excerpts of the Special Prosecutor's unredacted reports, including investigatory records procured or generated during the Special Prosecutor's investigation and -- in three successive orders dated February 27, 1984, July 30, 1984, and August 17, 1984 -- did obtain the particular relevant and material evidence it requested. The Special Division's orders limited disclosure to particular documents, some of which had been obtained during previous state and federal investigations, and grand jury testimony. All materials disclosed by the Special Division were limited to particularly specified portions of the reports which related specific subject-matters relevant to the Bronx, New York investigation, and included limited excerpts of grand jury testimony annotated to those portions of the reports. The Special Division ordered the same limitations on further disclosure as it had in its first order of November 12, 1982, that is, that no disclosure of the contents of these materials be made except to a grand jury in Bronx County, New York and other government personnel necessary to investigate and present evidence before a grand jury and to enforce the laws of the State of New York. Pursuant to these orders by the Special Division, the District Attorney did present evidence to the Grand Jury of Bronx County, New York.

In September 1984, in connection with that grand jury investigation, the District Attorney notified petitioners and the other parties listed in petitioners'

brief[8] that a grand jury investigation was under way and afforded them the opportunity to testify after waiving the transactional immunity automatically conferred by an appearance before a New York grand jury.

Some of the petitioners then applied to the Special Division in the same manner as had the District Attorney seeking their grand jury testimony. Accordingly, the Special Division did make disclosures to petitioners.

On October 2, 1984, indictments returned by the Grand Jury duly empanelled and sitting in Bronx County were unsealed; the indictments charged: (1) William Masselli and another with the murder of Salvatore Frascone ("the Frascone murder"), and (2) petitioners and other named parties with 137 counts of grand larceny, the falsification of business records, and offering a false instrument for filing ("the M.B.E. fraud"). The latter indictment involved the MBE fraud, the subject of the taped conversations between Nat Masselli and petitioner Levin, and included the Jopel bogus billing scheme.

On November 19, 1984, the Special Division disclosed to petitioners all the motion papers the District Attorney filed, all orders the Special Division entered in response to those motions, and "copies of all investigatory records procured or generated during the investigation of Special Prosecutor Leon Silverman which were previously disclosed to the District Attorney of Bronx County, New York."

On November 28, 1984, petitioner Donovan moved the Special Division "for an order vacating the dis-

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[8] Pet. Brief at ii.

closure orders and requiring return of all such grand jury materials to the Clerk of the Special Court."

On December 5, 1984, the Special Division denied petitioner Donovan's motion.

On March 5, 1985, petitioner Donovan made his first application to the Supreme Court of the United States for a writ of certiorari posing the following question, whether the Special Division may order "disclosure of federal grand jury materials without requiring the applicant [the District Attorney] for such materials to make a showing of compelling necessity or particularized need."[9]

In April 1985, the District Attorney, in its Brief in Opposition, demonstrated that both "particularized need" and "compelling necessity" had been shown to the Special Division before it authorized disclosure.[10]

On April 29, 1985, this Court denied Mr. Donovan's first petition for a writ of certiorari including its challenge to the sufficiency of the District Attorney's demonstration of "particularized need" and "compelling necessity." *Raymond Donovan v. Mario Merola*, ___ U.S. ___, 105 S. Ct. 2155 (1985).

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[9] *In re: Secretary of Labor, Raymond J. Donovan*, October Term, 1984, Docket No. 84-1400 (Supreme Court of the United States, March 5, 1985) Brief at i. By comparison, Petitioners' question posed in the pending application for a writ of certiorari is whether the Special Division "erred in allowing the District Attorney . . . to use secret federal grand jury materials at the Bronx County criminal trial of petitioners, without a showing of particularized need for such materials." [Pet. Brief at i.]

[10] *See generally*, Respondent's Petition at 18-21; *see also* note 9, *supra*.

On February 7, 1986, the District Attorney requested that the Special Division "authenticate" what had already been disclosed so that the District Attorney might admit the materials disclosed as evidence at the trial scheduled for September 2, 1986. The District Attorney requested of the Division what it believed was the performance of a ministerial act, namely, the authentication of records earlier disclosed.

Petitioners, however, asked the Special Division to consider anew the earlier disclosure to the District Attorney, and on March 26, 1986, the Division therefore asked the District Attorney to explain why this information was necessary for trial. Respondent complied. The Special Prosecutor also commented on the materials requested. The petitioners characterized the Special Prosecutor's comments made at the Court's request as an assertion that there were "alternative *non-secret sources for proof of many* of the items of information sought from the Silverman grand jury minutes (emphasis supplied)."[11] But that was not true. The Special Prosecutor could not find any "alternative" source of "information" for most of what the Special Division disclosed to the District Attorney. In addition, the Special Prosecutor referred to "alternative" not "equivalent" sources of "information," rather than "proof." Nor is it true that the "alternative" sources were "non-secret" as petitioners state; in several instances, the "alternative" source to grand jury testimony identified by the Special Prosecutor

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[11] "Application for a Stay" at 8, *In re: Secretary of Labor Raymon J. Donovan*, Case No. 81-2 (D.C.Circuit, Div. for Purpose of Appointing Indep. Counsel), filed August 7, 1986.

were grand jury exhibits that are presumably as "secret" as grand jury testimony.

By July 30, 1986, the Special Division, in a 2-1 decision, dismissed "the same arguments [that] were previously made to this Court in Defendants' motion to vacate the four prior orders of the Special Division . . ." referring to petitioner Donovan's motion of November 28, 1984. [See Pet. App. at 1a-18a.]

The Special Division noted the same arguments petitioners made, even the same four Supreme Court cases they relied upon,[12] had already been considered and rejected by the Special Division and then by the Supreme Court. The Division noted it had experience prosecuting criminal cases and found petitioners notion "bizarre" that the evidence the Special Division disclosed to the Bronx District Attorney for its grand jury investigation was not intended for use at trial as well.[13] Circuit Judge Morgan, then and now a member of the Special Division, confirmed "it was the intent of the Court [the Special Division] to authorize the District Attorney to use the evidence at trial. . ." [Id.]

Thus did the Division order the authentication respondent earlier requested. [Pet. App. at 5a.]

On August 7, 1986, petitioners applied for a stay of the Division's order of July 30, 1986. Defendants

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[12] The four cases were: *Douglas Oil Company v. Petrol Stops Northwest*, 441 U.S. 211 (1979); *Illinois v. Abbot & Associates, Inc.*, 460 U.S. 557 (1983); *United States v. Proctor & Gamble Company*, 356 U.S. 677 (1958); *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1983).

[13] For the detailed reference, *see* notes 6 and 7, *supra*.

made this application to the Honorable Walter Mansfield, U.S. Circuit Judge, who did dissent from the Division's order and Memorandum decision. [Pet. App. at 13a-18a.] Petitioners did not request the presiding state court judge to stay the trial, still scheduled for September 2, 1986.

On August 20, 1986, the Special Division denied petitioners' application for a stay.

On September 9, 1986, petitioners' criminal trial commenced in Bronx County, New York.

On September 19, 1986, petitioners filed their application for a writ with this Court.

On September 23, 1986, respondent received a copy of the petition.

ARGUMENT

POINT ONE Petitioners seek a writ of certiorari for the very same reasons that this Court denied an earlier petition.

On March 5, 1985, petitioner Donovan requested this Court to issue a writ to consider whether the Special Division may order "disclosure of federal grand jury materials without requiring the applicant [the District Attorney] for such materials to make a showing of compelling necessity or particularized need." Although this Court denied that application, presumably because it found no merit to the argument, petitioners made the same argument to the Special Division below causing the Division to comment on the fact that petitioners were making the same arguments and citing the same cases. Petitioners now have submitted this petition requesting that this Court consider whether the Special Division "erred

in allowing the District Attorney . . to use secret federal grand jury materials at the Bronx County criminal trial of petitioners without a showing of particularized need for such materials." This question is indistinguishable from the earlier submission and as petitioners cite no new case authority nor any newly uncovered facts not before the Supreme Court in its earlier petition, respondent respectfully submits that this redundant petition should be denied as frivolous.

POINT TWO The Special Division reaffirmed its earlier decision upholding the disclosure orders based on the District Attorney's demonstration of particularized need and compelling necessity.

Under Rule 6(e) of the Federal Rules of Criminal Procedure, parties seeking grand jury transcripts must show that the material is needed: (a) "to avoid a possible injustice in another judicial proceeding," (b) that "the need for disclosure is greater than the need for continued secrecy," and (c) that the request is structured to cover only material so needed." *Douglas Oil Co. v. Petrol Stops Northwest, supra,* 441 U.S. at 222.

A. This disclosure involves a "judicial proceeding."

There is no question that the grand jury proceeding is a "judicial proceeding". *Cobbledick v. United States* 309 U.S. 323, 327 (1940). Nor that a trial following an indictment is a "judicial proceeding."

B. Failure to disclose the grand jury materials would cause, not avoid, a "possible injustice."

The "statement of the case" above plainly illustrates there was a close nexus between the grand jury investigation by the Special Prosecutor and the

murder of Nat Masselli. An Assistant Special Prosecutor even had to testify at the Masselli murder trial. There was no alternative source of evidence available. There was also the inter-relationship between some subjects of the Special Prosecutor's investigation, namely Schiavone Construction Company, Jopel Contracting and Trucking Corporation and Nargi Contracting and Trucking, and the motive for the murder of Salvatore Frascone. The Special Division was therefore well aware of the compelling necessity for respondent to obtain the evidence from the Special Prosecutor. The Special Division was also apprised of and sensitive to respondent's inability to utilize compulsory process, since a compelled appearance before a New York grand jury automatically confers transactional immunity on a subpoenaed witness. Accordingly, in its Memorandum decision, the Special Division concluded it was "undeniable that the state criminal prosecutions of Indictments numbered 3570/84 and 3571/84 [the Frascone murder and the MBE fraud] are closely related to the investigation conducted by Special Prosecutor Silverman, which was limited to the investigation of possible violations of 29 U.S.C. Sec. 186 and other federal offenses." [Pet. App.at 10a.] It would be an "injustice" to deny respondent disclosure because, as the Special Division found, "the grand jury information is germane, as detailed by the District Attorney's extensive particularization, to *criminal* matters of tremendous importance to the State of New York" involving murder and grand larceny, as opposed to "the less compelling situation of a state agency seeking federal grand jury testimony to aid in the enforcement of state *civil* laws." [Pet. App.at 10a.] The Special Division cited *Illinois v. Abbot & Associates, supra*, 460 U.S. at 567-

568, n.15, for the proposition that "the court should consider that the request comes from a governmental body, rather than a private party." [Id.]

C. Nor is the secrecy of the Special Prosecutor's grand jury proceeding compromised by disclosure.

Petitioners argue that the minutes of the Special Prosecutor's grand jury proceedings should be kept secret. Their argument appears to admit no exceptions. But such a proposition is inapposite to the relevant case authority. In *Douglas Oil Co. v Petrol Stops Northwest, supra*, 441 U.S. at 222, the Court said:

> It is equally clear that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification.

In any grand jury investigation, the need for secrecy declines once the investigation concludes. The nature of the Special Prosecutor's responsibility and the concomitant disclosure of his findings in accordance with that responsibility perforce require a lessening of any need to preserve the secrecy of proceedings disclosed in substance, even when not in detail. The Ethics in Government Act, from whence the Special Prosecutor derives this responsibility, indeed obligation, authorizes far greater disclosure of grand jury information than would be the case with a typical federal grand jury. *See e.g.*, 28 U.S.C. §§592, 595. The legislative history of this Act makes it equally clear that enhanced disclosure was considered essential to avoid the appearance of a star chamber proceeding:

> The Committee strongly feels that this type of detailed information about the activities of the office of special prosecutor should be recorded and preserved and made available to the public and the Congress when the court [the Special Division] deems appropriate.

Rep. No. 95-175, 95th Cong, 2d Sess. at 71, *reprinted in* 1978 U.S. Code Cong. and Admin. News at 4274; *see also* S. Rep. No. 95-170, 95th Cong., 2d Sess. at 65 *reprinted in* 1978 U.S. Code Cong. and Admin. News at 4281. As the Special Division found disclosure appropriate in this case, the identity of every witness that testified before the Special Prosecutor's grand jury was disclosed in the public reports of the Special Prosecutor, dated June 25, 1982 and September 10, 1982. Summaries of the witnesses' pre-appearance interviews were also set forth at length and distributed, free of charge, to the public by the Special Division. All of the materials respondent requested, and more, were distributed to petitioners for use at the trial now underway, also by the Special Division. Thus, the Special Division was able to conclude that grand jury secrecy was "no obstacle" to disclosure since: (a) there is "no major concern for the confidentiality of grand jury witnesses" as they have already been identified, (b) "much of the substance of the grand jury materials presently being sought has already been publicly released", (c) "the *defendants* were authorized by this court [the Special Division] to use all the *identical* grand jury material *at trial*", and (d) "the District Attorney's request is narrowly tailored to preserve as much as possible the secrecy of the grand jury proceedings." [Pet. App. at 10a-11a.]

D. The District Attorney asked specifically for only such evidence as was absolutely necessary to prosecution.

The disclosure to respondent was not "wholesale" as characterized by petitioners. [Pet. Brief at 8.] Respondent made four disclosure applications to the Special Division with the consent of the Special Prosecutor. The Special Division ordered disclosure of particularly defined excerpts of the Special Prosecutor's unredacted reports including investigatory records in the custody of the division of the Court, and limited excerpts of Grand Jury testimony annotated in those portions of the reports. The Special Division underscored how particular the District Attorney was in his request stating "the [complete set of] files compiled during the course of Special Prosecutor Silverman's investigation amount to approximately 112 feet in length, [and] the Grand Jury materials [requested by the District Attorney and] exemplified in the present order amount to less than thirty inches of interviews, exhibits and grand jury testimony. . ." [Pet. App. at 9a.]

It is exactly because aspects of the grand jury proceedings were publicly disclosed in the Special Prosecutor's Report that respondent was able to specify what was necessary to the Bronx County murder and fraud investigations. As a result of the Special Division's recent request that respondent specify the materials it needed for trial, based on petitioners reargument of the Special Division's earlier disclosure orders, and because respondent was in the unique position of having previously received and used the materials disclosed, respondent was able to specify the required testimony even to the particular line needed from a particular page in the grand jury tran-

script. There is no better reaffirmation of the Special Division's earlier disclosure orders and decision in December 1984 to uphold these orders. It is doubtful that any court is likely ever to see a more particularized request than the one submitted by respondent to the Special Division in this case.

In desperation, petitioners misstate the law, contending that disclosure to respondent is proper only if there is *no* alternative source for the materials requested, in reliance on *In re Disclosure of Evidence*, 650 F.2d 599 (5th Cir. 1981). Petitioners, however, choose to overlook *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 445 (1983), in which this Court said the existence or absence of alternative sources was not determinative by itself; it was only a factor to be considered:

> On the other hand, for example, in weighing the need for disclosure, the court *could take into account* any alternative discovery tools available by by statute or regulation to the agency seeking disclosure.

In any case, the "alternatives" petitioners advert to are not "alternative" sources for grand jury testimony by any stretch of the imagination and, interestingly enough, the "alternatives" they propose are only concerned with two of the petitioners.

Firstly, Petitioner Schiavone. Petitioners suggest the verified complaint of petitioner Schiavone "filed prior to the Bronx County indictment [Pet. Brief at 11]" but -- and this petitioners fail to mention -- after he'd been apprised of the Bronx County investigation is an adequate substitute for petitioner Schiavone's actual sworn testimony before the Grand Jury. This

despite the fact that petitioner Schiavone's sworn testimony is a detailed, first-hand account of what he knew and when he knew it, as well as the intent behind the actions described. That testimony was given before the Bronx investigation began and so before any motive to fabricate existed. Furthermore, the complaint cannot substitute for Schiavone's sworn statement because it contains omissions which render it incomplete. In fact, of the forty-four probative facts established by defendant Schiavone's testimony before the Silverman grand jury, only eight are even mentioned in the verified complaint. Among the missing facts are those related to the takeover of the Nargi contract by Jopel, the circumstances surrounding the assignment of Nargi's subcontract to Jopel, and facts demonstrating Schiavone's knowledge of Jopel's status as a fraudulent minority business enterprise.

Secondly, Petitioner Donovan. Petitioners suggest that Donovan's federal grand jury testimony is unnecessary because of his prior testimony before (a) the Senate Committee on Labor and Human Resources during his confirmation hearings to become Labor Secretary in 1981, (b) at a removal hearing, and (c) the Bronx grand jury during the investigation that led to the indictments and trial underway.

(a) The Senate Committee testimony. As to the testimony before the Senate Committee, it need only be recalled that the primary reason the Special Division appointed Special Prosecutor Silverman in the first place was to investigate allegations of misconduct which were unknown to the Senate Committee at the time of its confirmation hearings. Among the allegations unknown to the Senate Committee were the relationship between petitioner Schiavone Construc-

tion Company and Jopel, the nature and extent of the relationship between petitioner Donovan and William Masselli, and the fraudulent acts relating to the MBE. Accordingly, that prior testimony before the Senate, concededly deficient in the most significant way, cannot substitute for the grand jury transcripts in the Special Division's possession.

(b) The removal hearing. As to the testimony at the removal hearing, because of the limited nature and purpose of that hearing, the full details which underlie the crimes charged in Bronx County indictment number 3571/84 were not developed.

(c) The Bronx Grand Jury. Finally, while the District Attorney does intend to use in his direct case the testimony of petitioner Donovan before the state grand jury, its evidentiary value lies primarily in the fact that it so contradicts the testimony and interviews collected by the Special Prosecutor that it is further evidence of his consciousness of guilt. Furthermore, petitioner Donovan claimed to lack knowledge or memory concerning key facts while testifying before the Bronx grand jury. The interviews and testimony before Silverman's grand jury, however, cure many of those lapses by providing the missing incriminating facts.

Thus, petitioners cannot point to any alternative source for the evidence in the Special Division's possession as none exists.

Nor have they even attempted to suggest any alternative source for the interviews and testimony of petitioners Joseph DiCarolis, Morris Levin, Gennaro Liquori, Albert Magrini or defendants Joseph Galiber and William Masselli.

E. The Special Division therefore did not abuse its discretion.

In this case, the need for disclosure was clearly greater than the need for continued secrecy. The grand jury had completed its investigation, and its findings, contained in the Special Prosecutor's reports, had been released to the public by the Special Division. The public versions of the reports had detailed the substance of the grand jury materials sought, and the Special Division of the Court, in disclosing the materials to the District Attorney of Bronx County, New York, strictly limited further disclosure. The public interest served by disclosure was surely considered by the Special Division. Indeed, in its recent decision the Special Division said "the investigation and report of Special Prosecutor Silverman contributed materially to the present criminal prosecutions in the Bronx." [Pet. App. at 12a.] As for concerns about prospective witnesses in such investigations, the Special Division said:

> The Special Prosecutor's investigation of Raymond Donovan, an investigation that this court has been associated with from the outset, represented an extraordinary investigation of grave public purpose, and it is unwise to extrapolate broad-ranging general principles of law from this extended exercise in cooperative state/federal law enforcement.
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> [Pet. App. at 12a.]

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

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Respectfully submitted,

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